

### REMARKS

As a preliminary matter, the international application forming the basis of the subject national application was amended, consistent with PCT Art. 34 and Rules 46.5 and 66.8, in Applicants' paper captioned "Response to 1<sup>st</sup> Written Opinion," April 5, 2004. More particularly, claims 1 and 13 were amended, and new claim 26 added. No PCT Art. 19 amendments have been made, nor are further international application amendments contemplated.

In direct response to the International Preliminary Examining Authority's Response, Supplemental Box(V)(2) of the Report, it is respectfully submitted that not giving patentable weight to the recitation added via Amendment of April 5, 2004 is legal error. First, the Authority states a general rule as to claimed "articles," and subsequently, in error, applies it to Applicants' claimed composition. Second, it is well established law that functional language, as that utilized by Applicants here, must be evaluated and considered just like any other limitation of the claim (see generally, e.g., MPEP §2173.05(g), rev. 2, May 2004, and Chisum on Patents §8.04, and more particularly, In re Stencel, 828 F.2d 751, 755, 4 USPQ2d 1071, 1073 (Fed. Cir. 1987), and Wright Med. Tech., Inc. V. Osteonics Corp., 122 F.3d 1440, 1443-44, 43 USPQ2d 1837, 1840 (Fed. Cir. 1997)).

Further as to the Authority's analysis, in addition to giving no patentable weight to Applicants' recitation of functionality

associated with the "buffering agent," and saying so, Applicants' requirement of the "composition being suitable for direct application to the product of the packaged product with no consumer detectable change in product character" was just flat out, and erroneously, ignored. Stobel et al. clearly do not disclose "a water-miscible solvent system" for "direct application to the product of the packaged product," as Applicants require.

With regard to the proposed claim amendments, they have been made for the sake of clarity. Both the amended claims, i.e., claims 1-26, and the newly added claims, i.e., independent claims 27 and 28, emphasize that Applicant's **oxygen scavenging composition is a dry or non-aqueous composition, and is for direct contact application** to/with a product of a packaged product which is susceptible to oxygen degradation. No new matter has been added via the proposed amendments.

**Applicants' Claimed Subject Matter: Independent Claims 1 & 26-28**

Of the pending claims, i.e., claims 1-28, the independent claims are claims 1, and 26-28. The claims are directed to: a dry, organic oxygen scavenging composition, comprising, among other things, a suitable non-aqueous neutralizing agent (claim 1); an non-aqueous enzymatic oxygen scavenging composition, comprising, among other things, an effective amount of a dry neutralizing agent (claim 26); an organic oxygen scavenging composition comprising non-aqueous ingredients (claim 27); and, providing an organic

oxygen scavenging composition comprising non-aqueous ingredients in the context of a method of food preservation (claim 28).

**Claims 1 & 26: Strobel et al.**

It is respectfully submitted that any "composition" of Strobel et al. lacks one or more of Applicant's claimed features, e.g., a non-aqueous neutralizing agent, and, as such, Strobel et al. cannot be an anticipatory reference.

First, in contradistinction to Applicant's invention directed to a composition, Strobel et al. is directed to **a structure**, more particularly, "to a porous structure having an extremely thin hydrophilic polymeric shell over a complex geometric configuration of the structure which is loaded with an oxidase enzyme." (1:26-29). Absent from Strobel et al. is any explicit or implicit disclosure directed to an oxygen scavenging composition. To the extent the Office maintains the Authority's posture that the "composition" of Strobel et al. is the process intermediary "water-miscible solvent system," it can be hardly said that Strobel et al.'s disclosure of an aqueous buffer system satisfies Applicants' requirement of a "non-aqueous neutralizing agent."

Second, assuming arguendo that the Strobel et al. "structure" is "composition," it likewise can hardly be said to include a non-aqueous neutralizing agent as Applicants require. Strobel et al. go to great lengths to say what they mean, and mean what they say, for example, at 7:31-32 they state: "'Enzyme system" means an enzyme or

a mixture of an enzyme and a substrate or other compounds," and later at 16:32-45, they describe a plethora of enzyme systems. No where is it disclosed that the oxygen scavenging **composition** includes a neutralizing agent, let alone a non-aqueous neutralizing agent as is required by Applicants' claimed subject matter.

Finally, as to the Authority's Response, it states that it is the "water-miscible solvent system of Strobel et al. that corresponds to the claimed composition." This solvent system is an intermediary in their process of "loading an enzyme system on hydrophilic surfaces without denaturing the enzymatically active material." (7:59-61). Strobel et al. provide a suitable pH for storing an enzyme in solution during transfer to their structure, namely, as a step in the production of their structure. Strobel et al. is silent with regard to neutralizing byproducts of an enzymatic reaction in order to **maintain** a suitable environment for the enzymatic reaction, as the reaction takes place. In contradistinction thereto, the instant invention provides a calculated quantity of neutralizing agent to effectively neutralize the byproducts of the enzymatic reaction as oxygen scavenging takes place. No a priori buffering is required.

**Claim 1 & 2: Akao et al.**

It is respectfully submitted that as Akao et al. lack one or more of Applicant's claimed features in an oxygen scavenging composition, it cannot be an anticipatory reference. More

particularly, Akao et al., in contradistinction to Applicants' claim 1 requirement, do not disclose an organic oxygen scavenging composition which includes a neutralizing agent, instead, they exclusively disclose mixture compositions of **iron** (31:11-22).

Furthermore, as discussed in relation to Strobel et al., no analysis of Applicants' further functional claim requirements are set forth in the Report, i.e., are alleged shown in Akao et al. It is respectfully submitted that the reference is silent as to neutralizing agent functionality, as well as silent to the suitability of direct application of the composition to the product of the packaged product, because Akao et al. clearly do not contemplate same, instead, they provide column after column after column of disclosure directed to their **packaging material** for photographic photosensitive materials.

#### **Claims 1-3: Hitzman**

It is respectfully submitted that as Hitzman lack one or more of Applicant's claimed features in an oxygen scavenging composition, it cannot be an anticipatory reference. More particularly, Hitzman, in contradistinction to Applicants' claim 1 requirement, does not disclose a dry oxygen scavenging composition comprising a non-aqueous neutralizing agent, instead, only aqueous preparations characterized by an aqueous buffer are disclosed (8:39 et seq.), and to the extent a dry oxygen scavenging composition is disclosed, absent from the crystalline alcohol oxidase, (9:20 et

seq.) is Applicants' neutralizing agent.

**New Claims 27 & 28**

Independent claims 27 and 28 are directed to an organic oxygen scavenging composition comprising non-aqueous ingredients, and in a method of food preservation, a step of, among other things, an organic oxygen scavenging composition comprising non-aqueous ingredients, respectively. As the foregoing analysis with respect to Strobel et al., Akao et al., and Hitzman bears directly upon the requirements of the newly added claims, it is respectfully submitted that the subject claims are patentably distinct thereover, and thus, in condition for allowance.

**CONCLUSION**

For the reasons above, it is respectfully submitted that the subject case, including newly added claims, is in condition for allowance. Early reconsideration and such action are solicited.

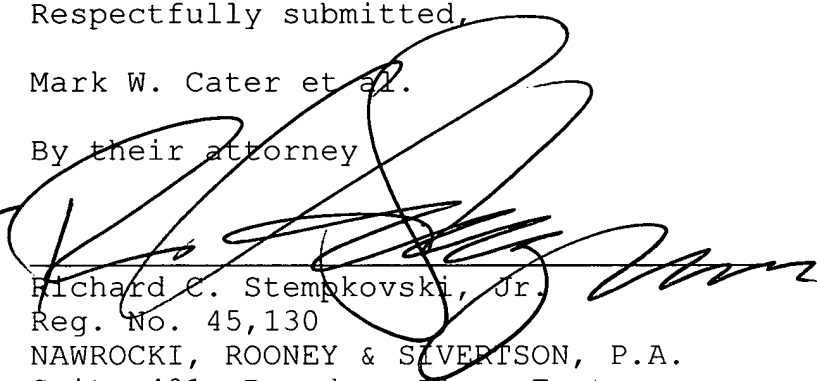
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Respectfully submitted,

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By their attorney

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